SUPREME COURT OF APPEALS OF VIRGINIA.

DILLARD et al. *v.* JEFFERIES.

Nov. 11, 1915.

[86 S. E. Rep. 844.]

1. Partition (§ 55*)—Bill—Sufficiency.—A demurrer to a bill for partition was properly overruled, where the tenancy in common of complainant with defendants appeared from the allegations of the bill.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148-159, 182; Dec. Dig. § 55.* 86 S. E. 844, 10 Va.-W. Va. Enc. Dig. 769.]

2. Judgment (§ 569*)—Conclusiveness of Decree—Interlocutory Decrees.—Where, in a suit for partition, the plea alleged that the court was without jurisdiction to entertain the bill, that the title claimed by defendants was adverse to complainant, and that complainant and those under whom she claimed were not tenants in common with defendants, a decree overruling a motion to reject the plea and directing complainant to join issue thereon, to the end that the court might determine from the evidence adduced thereunder whether the case was a proper one for the jurisdiction of a court of equity in a suit for partition, left the whole controversy on the merits as well as to the jurisdiction of the court open for further determination after the evidence was adduced, and it was unnecessary for complainant to appeal therefrom to prevent it becoming the law of the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.* 6 Va.-W. Va. Enc. Dig. 279.]

3. Deeds (§ 105*)—Construction—Parties—"His Children."—A deed conveying land to L. as trustee for the use and benefit of his wife, S., during her life, and after her death to divide the land among "his children" equally and their descendants, who should take per stirpes, could not be construed to exclude a child of L. by a former wife and her descendants.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 276, 277, 292; Dec. Dig. § 105.* 4 Va.-W. Va. Enc. Dig. 419.]

4. Deeds (§ 101*)—Construction—Practical Construction.—Where it did not appear that complainant, a grandchild of L. by his first wife, had ever interpreted the deed as referring only to the children of S., it could not affect her rights that S. and her children had so interpreted the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 233; Dec. Dig. § 101.* 4 Va.-W. Va. Enc. Dig. 419.]

5. Evidence (§ 450*)—Construction of Deed—Practical Construction.—There being no ambiguity whatever in the language of the deed,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

parol evidence was not admissible to show the construction placed thereon by the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.* 10 Va.-W. Va. Enc. Dig. 654.]

6. Reformation of Instruments (§ 32*)—Suits to Reform Instruments—Laches.—If the failure to exclude a child of L. by his first marriage was an inadvertence, the mistake should have been promptly corrected by a suit to reform the instrument, and more than 40 years after its execution and recording, and after the death of the principal parties thereto, it could not be corrected without risk of doing the greatest injustice to a grandchild by the first marriage.

(Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.* 11 Va.-W. Va. Enc. Dig. 905.]

7. Tenancy in Common (§ 8*)—Sale by Cotenant—Status of Purchaser.—The sole surviving child of a child of L. by his first marriage was a tenant in common with purchasers of the land from S. and her children; such purchasers occupying the same relation to her that their grantors did.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 20; Dec. Dig. § 8.* 8 Va.-W. Va. Enc. Dig. 122.]

8. Ejectment (§ 13*)—Title to Support Action—Equitable Title.—The sole surviving child of a deceased child of L. could not bring ejectment against her co-tenants in remainder under such deed, as the estate sought to be recovered was a trust estate, and the plaintiff in ejectment must hold the legal title, and cannot recover on an equitable title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58; Dec. Dig. § 13.* 4 Va.-W. Va. Enc. Dig. 883.]

9. Partition (§ 13*)—When Maintainable—Disputed Title.—Though purchasers of land from certain of the tenants in common therein claimed under a deed purporting to convey the whole of the land, another of the tenants in common could sue in equity for partition thereof.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 36, 81; Dec. Dig. § 13.* 10 Va.-W. Va. Enc. Dig. 779.]

10. Limitation of Actions (§ 72*)—Persons under Disability—Infancy.—Under Code 1904, § 2917, providing that, if at the time at which the right of any person to make entry on or bring an action to recover any land shall have first accrued such person was an infant or insane, then such person or the person claiming through him may, notwithstanding the statutory period of limitation shall have expired, make an entry or bring an action within 10 years next after the time at which such person shall have ceased to be under such disability, where complainant at the time land of which she was a tenant in

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

common was sold to defendants by the other tenants in common was under 21 years of age, a suit against defendants for partition was properly brought within 10 years after she became of age.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 390-398; Dec Dig. § 72.* 9 Va.-W. Va. Enc. Dig. 413.]

Appeal from Circuit Court, Albemarle County.

Suit by Elizabeth S. Jefferies against G. M. Dillard and others for partition. From a decree holding that complainant was entitled to maintain the suit and to have partition, defendants appeal. Affirmed.

Elliott & Walsh, G. M. Dillard, and *Williams, Tunstall & Thom,* all of Norfolk, for appellants.

W. D. Patteson, of Scottsville, and *A. S. Bolling,* of Charlottesville, for appellee.

HARRISON, J. The bill in this case was filed by Elizabeth S. Jefferies, asking for the partition of a tract of land containing 15 acres between herself and G. M. Dillard and others, who were in possession and claiming the fee in the whole tract. The circuit court held that the complainant was entitled to maintain her suit and to have partition of the land in controversy. From that decree, this appeal has been taken.

The record shows that by deed dated July 11, 1871, John S. Moon and wife conveyed a tract of land, of which that in controversy is a part, to John O. Lewis, as trustee, for the benefit of his wife for life, and at her death the same to be divided among his children equally and their descendants, who should take per stirpes. John O. Lewis was twice married. By his first marriage he left one daughter, who was the mother of his granddaughter, the complainant, and by his second marriage he had eight children. It further appears that the father of complainant and a sister departed this life some time before the institution of this suit; leaving complainant the sole surviving representative and heir of her mother, who, as already seen, was the only child of John O. Lewis by his first wife. It further appears that on the 9th day of September, 1896, Sallie C. Lewis and her children united in a deed conveying the 15 acres of land in controversy to the defendants, G. M. Dillard and others. At the time of this sale the complainant was less than 15 years of age, and did not unite in or agree to the same, and did not receive any part of the proceeds therefrom. The contention of the complainant is that she was a joint tenant in common with Sallie C. Lewis and her children, and that, when the defendants bought the interests of

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her joint tenants in the 15 acres of land, she became joint tenant with them, and as such is entitled to partition in kind or a sale and division of the proceeds.

[1] We are of opinion that the demurrer to the bill was properly overruled. The tenancy in common of the complainant with the defendants appeared from the allegations of the bill, and, if those allegations were established, the complainant was entitled to the relief asked.

[2] We are further of opinion that there is no merit in the contention that the decree of March 8, 1913, was the binding law of the case from which the complainant failed to appeal, and cannot now question that it was the correct solution of the case. Plea No. 1 of the defendants alleged that the court was without jurisdiction to entertain the bill, that the title claimed by them was adverse, and that the complainant and those under whom she claimed were not tenants in common or coparceners with the defendants. The decree mentioned of March 8, 1913, after stating that the court must determine from the facts in each case whether jurisdiction should be assumed, overruled the motion to reject the plea, and directed the complainant to join issue upon the same, "to the end that the court might determine from the evidence adduced thereunder whether or not this is a proper case for the jurisdiction of a court of equity in a suit for partition." There was no ruling by this decree in any way affecting the complainant's title, or making it necessary for her to appeal therefrom. On the contrary, the whole controversy on the merits, as well as to the jurisdiction of the court, was left open for future determination after the evidence was adduced.

The defendants further contend that the circuit court erred in holding that the complainant owned an interest in the land in controversy, and that she was a tenant in common with the defendants and entitled to maintain her suit for partition.

[3-6] To show the fallacy of the contention that complainant owned no interest in the land in question, it is only necessary to refer to the deed of July 11, 1871, under which the complainant holds title, which conveys the land to John O. Lewis, as trustee, for the sole use and benefit of his wife, Sallie C. Lewis, during her life, and after her death he shall divide the same among his children equally and their descendants, who shall take per stirpes. This language is unambiguous and too plain for interpretation. By no reasonable construction can such language be held to exclude the child of John O. Lewis by his first wife. The words "his children and their descendants" necessarily include his child by his first marriage, who was complainant's mother, and, being the only heir of her mother, she takes under the express terms of the deed her mother's interest. But the defendants contend

that the failure to use language to exclude the child by the first marriage was an inadvertence of the draftsman of the deed, and that the language "his children" had since been interpreted by the parties to mean the children of John O. Lewis by his second marriage. There is nothing in the record to show that the complainant ever placed any such interpretation upon the language or ever consented to any such interpretation by others. It can in no way affect the rights of complainant in the land that Mrs. Sallie C. Lewis and her children construed the deed so as to exclude the child by the first marriage. There is no ambiguity whatever in the language used, and, when that is the case, parol evidence is not admissible to show the construction placed thereon by the parties. Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4; Knick *v.* Knick, 75 Va. 12; Bank *v.* McVeigh, 32 Grat. (73 Va.) 530, 541. Further, if the failure to exclude the child of the first marriage was an inadvertence, the mistake should have been promptly corrected by a suit in equity to reform the instrument. It has now been more than 40 years since the deed of July 11, 1871, from which the parties to this suit derive their title, was executed and recorded, and the defendants have themselves held a deed to the land in controversy since September, 1896, and yet neither they nor their predecessors in title have ever asserted that there was any such mistake as now alleged, or asked a court of equity to correct the same, until the institution of this suit by the complainant to enforce her rights.

"A party having a just claim to invoke the jurisdiction of that court upon equitable grounds must exercise reasonable diligence in the assertion of his demands. If by his laches injustice may be done the defendant, the court declines to interfere. And this principle is justly applied to bills to reform contracts on the ground of mistake as to other cases." Carter *v.* McArtor, 28 Grat. (69 Va.) 356, 364.

In the case at bar the alleged mistake is not established, and the principal parties to the deed in which the mistake, if any, occurred are now dead, and the correction which is now demanded could not be made without risk of doing the complainant the greatest injustice.

[7, 8] With respect to the contention that the complainant was not a tenant in common with the defendants, and therefore was not entitled to maintain this suit for partition, we are of opinion that the circuit court properly held to the contrary. Under the deed of July, 1871, from Moon and wife to John O. Lewis, trustee, the mother of the complainant was unquestionably a tenant in common in remainder with the children of Sallie C. Lewis, her stepmother. The complainant now stands in the shoes of her mother. In 1896 the defendants bought the interests of all of her

cotenants, and hence they occupy the same relation to the complainant that their grantors did; that is, joint tenants in common, all deriving their title from the same common source, to wit, the deed of July 11, 1871, from Moon and wife to Lewis, trustee. The estate which the complainant seeks to recover is a trust estate. She does not hold the legal title, and could not, therefore, as contended, have brought an action of ejectment to recover her interest in the land. The plaintiff in ejectment must hold the legal title, and cannot recover on an equitable title. Virginia Iron, etc., Co. *v.* Cranes Nest Co., 102 Va. 406, 46 S. E. 393; Leftwich *v.* City of Richmond, 100 Va. 164, 168, 40 S. E. 651. There are no special circumstances in the case at bar to take it out of the general rule announced by these cases.

[9] The defendants further contend that they hold adversely under a deed which purports to convey them the whole of the land in controversy, and therefore that a suit in equity for partition does not lie, and that an action of ejectment is the proper remedy. This contention is contrary to the view taken by this court in several cases. Pillow, etc. *v.* Southwest Va. Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Morgan *v.* Haley, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204, and others.

In Pillow *v.* Imp. Co., supra, it is said:

"Of course, a partition suit cannot be made a substitute for an action of ejectment; and if the defendant in such suit does not claim under any one who was a joint owner, such as a co-parcener, joint tenant, or tenant in common with the complainant, or those under whom he claims, then it is clear that such suit would not be proper; but if the defendant does claim under one who was a joint owner with the complainant, or those under whom he claims, the defendant cannot defeat the right of the complainants to have their legal rights settled in a suit for partition by merely alleging and proving that he denies the rights of the complainant, and holds adversely to him. If the jurisdiction of the circuit court could be defeated in this manner, the statute would be of little value, and would fail to attain the chief object for which it was passed."

And in Morgan *v.* Haley, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.), 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204, supra, the court says:

"It is quite true, as argued, that a suit for partition, under the provisions of section 2562, Code 1904, cannot be made a substitute for an action of ejectment (Pillow *v.* Southwest Imp. Co., 92 Va. 144 [23 S. E. 32, 53 Am. St. Rep. 804]), but it is equally true that a court of equity has jurisdiction to partition land under some circumstances, although the defendant claims title to the

whole tract, where he (or those under whom he claims title) was a joint owner with the complainant or those under whom he claims title. See Pillow *v.* Southwest, etc., Imp. Co., supra."

The cases of Johnston *v.* Virginia Coal & I. Co., 96 Va. 158, 31 S. E. 85, and Preston *v.* Mining Co., 107 Va. 245, 57 S. E. 651, relied on by defendants, are not in conflict with the decisions we have cited. In those cases, if the relation of tenant in common between the parties was ever established, it had ceased to exist, and the stranger who bought and took possession of the whole tract had acquired his superior and wholly independent title by reason of his adversary possession for the statutory period.

[10] In the instant case the defendants contend that complainant's claim of an interest in the land was barred by their adverse holding for the statutory period. At the time (September, 1896) that the defendants bought from complainant's cotenants, she was an infant under 21 years of age. She had 10 years from the time she became of age in which to bring her suit. Code 1904, § 2917. She was born April 15, 1882. She therefore became of age April 15, 1903, and she instituted this suit on the 24th day of August, 1912, which was within 10 years from the time she became of age. In the light of these facts, it is unnecessary to consider other reasons relied on by complainant to show that her claim was not barred by the statute of limitations.

The defendants having no title by reason of their adversary possession, and the parties, plaintiff and defendants, being still tenants in common of the land in question, the complainant clearly had the right to maintain this suit for partition.

There is no error in the decree appealed from, and it is affirmed.

Affirmed.

KEITH, P., absent.

Note.

Equitable Title in Ejectment.—In the principal case it is held that the plaintiff in ejectment must hold a legal title, and cannot recover on an equitable one, unless there are special circumstances to take the case out of the general rule, and cites Virginia Iron, etc., Co. *v.* Crane's Nest Co., 102 Va. 406; Leftwich *v.* City of Richmond, 100 Va. 164. The general rule is well settled in this state. See 4 Va. & W. Va. Dig. 883.

Except in a very limited class of cases, a court of law, in an action of ejectment, is governed by the rigid rules of law, and decides according to the legal rights alone of the parties, and leaves them to settle their equitable rights in the equity forum, where alone they can be properly settled. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345.

In Suttle *v.* Richmond, etc., R. Co., 76 Va. 284, the plaintiff came into a court of law, in an action of ejectment, basing his right of recovery upon an equitable estoppel, and lost his case because he was

unable to show a legal title in himself, and a present right of possession under it at the time of the commencement of the action.

The opinion in Carter *v.* Ruddy, 166 U. S. 493, citing Landford *v.* Sherwood, 124 U. S. 74, 31 L. Ed. 344, 8 Sup. Ct. 429, and Johnson *v.* Christian, 128 U. S. 374, 32 L. Ed. 412, 9 Sup. Ct. 87, says: "It is well settled that an action of ejectment cannot be maintained in the courts of the United States on a merely equitable title."

If a person has only an equitable title, he must first acquire the legal title, and then bring ejectment: Tax Title Co. *v.* Denoon, 107 Va. 201, 57 S. E. 586.

Legal Title Inferred.—The principal exception to the general rule which requires the plaintiff in ejectment to have the legal title in order to sustain his action, is where the plaintiff is in the possession of the land, from which he is ousted, under circumstances from which the jury may infer a conveyance of the legal title. Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393.

Against Naked Trespass.—A plaintiff who has been in peaceable possession of land, and who is entered upon and ousted by a mere intruder or trespasser having no semblance of right or claim to the land, may recover in ejectment without proof of legal title. McDermitt *v.* Forbes, 69 W. Va. 268, 71 S. E. 193.

Against Tenant.—Another exception arises under the rule that the possession of the tenant is the possession of the landlord, and is not adverse to him, and the tenant will not be allowed to deny his landlord's title. Reusens *v.* Lawson, 91 Va. 226, 258, 21 S. E. 347.

Common Source Through Equitable Title.—It has recently been decided in the Circuit Court of Appeals, in Clinchfield Coal Corporation *v.* Steinman, 223 Fed. 743, which arose under § 2741 of the Virginia Code, that in an action of ejectment the plaintiff may show a common source through an equitable title. The court said: "In Marback *v.* Holmes, 105 Va. 178, the rule of common source was applied where it was shown by the record of a suit to which the defendant was a party that he had set up the equitable claim of specific performance against his father, from whom the plaintiff derived title. The defendant, however, relies upon the later case of Charles *v.* Hurley, 110 Va. 27, as overruling the earlier case, and holding that the rule of common source does not apply where the defendant claims under an equitable title. We do not think the decision bears that construction."

In Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763, Keith, P., reviews § 2741 and other sections of the Code, as well as the decisions by this court on the subject, and says: "The plaintiff may come into court upon an absolutely perfect equitable title, but will lose his case if the defendant can show an outstanding legal title in himself or a stranger, except in a few cases dependent upon certain technical principles." In that case the defendant sought to set up, under section 2741 of the Code, an equitable title in defense to the right of the plaintiffs, shown to be the holders of the legal title to the land in question. Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 405, 415, 46 S. E. 393.

In Absence of Equitable Defense.—Under the Code of North Carolina the plaintiff may maintain an action for possession of land upon an equitable title where the defendant has no equitable defense to such action. Wright *v.* Fort, 126 N. C. 615, 36 S. E. 113.

Where Equitable Title Coupled with Right to Possession.—An equitable title which is coupled with the right to possession, will sustain an action to recover possession, even against one holding the

naked legal title in some states. Lewis *v.* Hamilton, 26 Colo. 263, 58 Pac. 196; Railway Co. *v.* McBratney, 12 Kan. 9; Phillips *v.* Gorham, 17 N. Y. 270; Burt *v.* Bowles, 69 Ind. 1.

In Georgia it is held that after a purchaser of land has paid therefor and taken possession thereof, he has a perfect equity on which he could base an action of ejectment or defend against one, although no deed may have been executed, and equity will not subject land so purchased to the claim of one who holds an older equity of which no notice was given until after the purchaser had bought and taken possession. Temples *v.* Temples, 70 Ga. 480.

Title under Devise.—In Pennsylvania an agreement to devise land to a grandson, in consideration of a covenant for the payment of an annual sum during the lives of the devisor and his wife, followed by the execution of such a will, vests an equitable title in the devisee, which may be enforced by ejectment, after the decease of the devisor. Johnson *v.* McCue, 34 Pa. St. 180.